

<p style="text-align: center;">UNITED STATES OF AMERICA</p> <p style="text-align: center;">v.</p> <p>KHALID SHEIKH MOHAMMED, WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL-AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI</p>	<p style="text-align: center;">P-012</p> <p style="text-align: center;">Commission Ruling Regarding Prosecution Motion for Additional 60-Day Continuance</p>
--	---

1. This matter having come before the Military Commission upon government motion to grant a third continuance in this case until 16 November 2009;¹ and having considered the parties submissions, and for good cause shown; the Military Commission finds that the interests of justice served by continuing the Rule for Military Commission (RMC) 909 incompetence determination hearing² for Ramzi bin al Shibh, currently docketed for 21-25 September 2009, to allow the Administration time to determine whether he can be transferred or released, or prosecuted for criminal conduct before a military commission or Article III court; or provided other lawful disposition consistent with the national security and foreign policy interests of the United States and

¹ On 21 January 2009, the Military Commission granted, over objection, a government motion to continue this case to 20 May 2009. See P-009, *Commission Ruling Regarding Government Motion for 120-Day Continuance*. On 14 May 2009, the Commission granted a government motion for an additional 120-day delay to 17 September 2009. See P-010, *Commission Ruling Regarding Prosecution Motion for Additional 120-Day Continuance*.

² No person may be brought to trial by military commission if that person is mentally incompetent. Trial may proceed unless it is established by a preponderance of the evidence that the accused is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature of the proceedings or to conduct or cooperate intelligently in the defense of the case. RMC 909(e).

the interests of justice,³ outweigh the best interests of the accused and the general public in a prompt trial. As such, the unopposed government motion to continue the incompetence determination hearing for Mr. bin al Shibh to begin no earlier than 16 November 2009 is GRANTED.

2. The government also requests the Commission “refrain from taking any actions in the case ... to preserve the status quo ... to the greatest extent possible” until the Attorney General, in consultation with the Secretary of Defense, has determined the appropriate forum to prosecute the above named accused. The prosecution asserts that defense counsel for Messrs. al Hawsawi and bin al Shibh do not object to the government’s petition to halt further proceedings in this case, to include all on-the-record sessions, until no earlier than 16 November 2009. However, as Messrs. Sheikh Mohammed, bin ‘Attash and Ali are proceeding *pro se*,⁴ and have not yet indicated whether they too will join in the requested continuance, the Commission will hear argument as to this part of the motion at a session convened pursuant to RMC 803 in Courtroom 2, Guantanamo Bay, Cuba on 21 September 2009.

³ The President has tasked that the review with respect to those persons currently detained at Guantanamo Bay be completed on a “rolling basis and as promptly as possible”. See Executive Order 13492 of January 22, 2009, “Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities”.

⁴ *Pro se* legal representation refers to the circumstance of a person representing himself or herself without a lawyer in a court proceeding. *Pro se* is a Latin phrase meaning “for oneself”. Messrs. al Hawsawi and bin al Shibh have indicated on numerous occasions a desire to also proceed *pro se*. Even if the Military Commission ultimately determines both accused are competent to stand trial, the prosecution might still attempt to limit the accused’s self-representation rights by insisting upon trial defense counsel when the accused lacks the mental capacity to conduct

3. The Military Commission directs that a copy of this order be served upon each accused, the prosecution and all civilian and military defense counsel of record, and that it be provided to the Clerk of Court for public release. The underlying government motion will also be provided to the Clerk of Court for public release, after appropriate redactions for privacy and security considerations. The Military Commission further directs the Clerk of Court to have this order translated into Arabic and served upon each of the above named accused.

So Ordered this 17th Day of September 2009:

/s/
Stephen R. Henley
Colonel, U.S. Army
Military Judge

his own defense. *See Indiana v. Edwards*, 128 S. Ct. 2379 (2008). That issue, however, is not currently before this Commission and can be resolved only if the accused are determined competent to stand trial.

UNITED STATES OF AMERICA

v.

**KHALID SHEIKH MOHAMMED;
WALID MUHAMMAD SALIH MUBARAK
BIN ‘ATTASH;
RAMZI BINALSHIBH;
ALI ABDUL AZIZ ALI;
MUSTAFA AHMED AL HAWSAWI**

Prosecution Motion

For an additional 60-day continuance of the
proceedings in the above-captioned case until
16 November 2009

16 September 2009

1. Relief Requested. In the interests of justice, the Government respectfully requests the Military Commission grant an additional 60-day continuance of the proceedings in the above-captioned case until 16 November 2009.¹

2. Overview. The Government requests this continuance for an additional period of only 60 days. The review process that has necessitated the Government’s requests for continuances in this case is nearing completion. By no later than 16 November 2009, the review of the accused by a team of Department of Justice and OMC-P prosecutors will be complete, and the Attorney General, in consultation with the Secretary of Defense, will have determined whether the Government will either continue to prosecute the accused’s before this military commission, seek to prosecute the accused’s in a federal court in the United States, or pursue some other alternative. Executive Order 13492 (E.O. 13492, 74 Fed. Reg. 4897) requires the Secretary of Defense to take steps “sufficient to halt the proceedings” in this case until a decision is made whether and in what forum to prosecute this case. In addition, in May the President announced his support for military commissions’ reform and his commitment to work with Congress to amend the Military Commissions Act of 2006. In July, legislation to reform military commissions passed the Senate. House and Senate conferees are expected to meet to consider this legislation in late September/early October, and it is expected that the Defense Authorization bill will become law sometime later in October or in November. Given these circumstances, the interests of justice in one further 60-day continuance outweigh the interests of both the public and the accused in immediately proceeding forward.

3. Burden of Proof and of Persuasion. As the moving party, the Government bears the burden of persuasion. Rule for Military Commissions (R.M.C.) 905(c), Manual for Military Commission (M.M.C.), 2007.

¹ The Government is seeking similar continuances in the other cases pending before military commissions.

4. Facts.

a. On 22 January 2009, the President issued E.O. 13492, "Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities." That E.O. remains fully in effect and applies to all members of the Executive Branch. It directed an inter-agency review of "the status of each individual currently detained at Guantanamo" E.O. 13492, §4(a), 74 Fed. Reg. at 4898. The review participants were first tasked to "determine, on a rolling basis and as promptly as possible with respect to the individuals currently detained at Guantanamo, whether it is possible to transfer or release the individuals consistent with the national security and foreign policy interests of the United States" *Id.*, §4(c)(2), 74 Fed. Reg. at 4899. In cases of individuals not approved for release or transfer, the review participants were tasked "to determine whether the Federal Government should seek to prosecute the detained individuals for any offenses they may have committed, including whether it is feasible to prosecute such individuals before a court established pursuant to Article III of the United States Constitution" *Id.*, §4(c)(3), 74 Fed. Reg. at 4899. To facilitate those two tasks, the Secretary of Defense was directed to "ensure that during the pendency of the Review . . . all proceedings of such military commissions to which charges have been referred but in which no judgment has been rendered . . . are halted." *Id.*, § 74, Fed. Reg. at 4899. During the pendency of the Review, E.O. 13492 remains in full effect so that no "proceedings" may go forward.

b. On 22 January 2009, the President also issued E.O. 13493, "Review of Detention Policy Options" (74 Fed. Reg. 4901). E.O. 13493 established a Detention Policy Task Force, co-chaired by the Attorney General and the Secretary of Defense, "to conduct a comprehensive review of the lawful options available to the Federal Government with respect to the apprehension, detention, trial, transfer, release, or other disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations, and to identify such options as are consistent with the national security and foreign policy interests of the United States and the interests of justice." E.O. 13493, § 1(e), 74 Fed. Reg. at 4901.

c. In accordance with E.O. 13492 and the Defense Secretary's directive thereunder, the Government sought and obtained an initial continuance of this case in January 2009 that lasted until 17 May 2009. A second continuance was sought at the end of the first and is scheduled to expire on 17 September 2009.

d. In his speech at the National Archives on 21 May, 2009, President Obama recognized that "military commissions have a history in the United States dating back to George Washington and the Revolutionary War . . . [and that t]hey are an appropriate venue for trying detainees for violations of the laws of war." The President announced then that he had decided to work to reform and retain military commissions as one available and appropriate forum, along with Article III courts, for the prosecution of detainees at Guantanamo. Also in May the Secretary of Defense published and notified Congress of five significant changes to the M.M.C. which were recommended by the Detention Policy Task Force.

e. Legislative reform of the Military Commissions Act is now also pending. On 23 July 2009, the Senate passed significant changes to the law as part of the Defense Authorization Act for FY 2010. S.1390, Title X, Subtitle D, §§ 1031 *et seq.*, Roll call Vote No. 242, 115 Cong. Rec. 112 at S.8023 (July 23, 2009). Conferees from the Senate and House are expected to meet in late September or early October to consider these reforms. The full Congress is likely to pass the Defense Authorization bill sometime in October or November.

f. Related to the review process, in July the Departments of Justice and Defense agreed to a protocol pursuant to which cases referred for possible prosecution by the Guantanamo Review Task Force will be further considered by a joint DoJ-DoD team of prosecutors to determine whether the case should be prosecuted in an Article III court or by military commission. This case has been referred by the Task Force to the prosecution team for this consideration. That team is now conducting an in-depth review, which will lead to a recommendation to the Attorney General as to whether or not the case should be tried in an Article III court. The Attorney General will consider the recommendations, consult with the Secretary of Defense, and decide whether to pursue prosecution of the accused in an Article III court, allow prosecution to proceed in a military commission, or refer the case back to the E.O. 13492 Review for other appropriate disposition. He will make that determination within the 60 days of the requested continuance. (Declaration of Hon. Jeh C. Johnson, Attachment A.)

g. Under E.O. 13492, the Secretary of Defense must ensure that proceedings before military commissions are halted until the Review is complete. Matters not considered proceedings have occurred within the military commissions since the issuance of the E.O. and have not changed the *status quo* of the pending cases.

5. Argument.

a. R.M.C. 707(b)(4)(E)(i) authorizes the presiding judge of a military commission to grant a continuance of the proceedings if the interests of justice are served by such action and outweigh the best interests of both the public and the accused in a prompt trial of the accused. The requested continuance is in the best interests of justice because it will permit the Presidentially-directed review of the accused to be completed and will permit the full Congress time to act on the pending military commissions' reform legislation.

b. The interests of justice served by granting the continuance outweigh the interests of both the public and the accused in immediately proceeding forward. The review of the detainees' status and the pending legislative amendments to the MCA may result in changes that will (1) necessitate re-litigation of issues in this case or (2) produce legal consequences affecting the options available to both the accused and the Government. It would be inefficient and potentially unjust to deny the requested continuance when the MCA is currently being reformed by the Congress and before the

Attorney General, in consultation with the Secretary of Defense, has decided the forum in which the accused will be prosecuted.

c. Extending the continuance in this case for a final 60 days will give the Administration adequate time to complete its review and the Congress a similar opportunity to reform the MCA -- all to ensure that the interests of justice, as well as the national security and foreign policy interests of the United States, are best served. Under these circumstances, an additional 60-day delay is not prejudicial to the accused and is consistent with the interests of the public.

6. Scope of Request.

a. Concerns have been raised about the scope and effect of the continuances that the Government has sought and that the judges have granted in this case and others before the military commissions. E.O. 13492 directs the Secretary of Defense to take "steps sufficient to ensure that during the pendency of the Review . . . all proceedings of [the] military commissions . . . are halted." It was in furtherance of that obligation that the Secretary originally directed the Chief Prosecutor to seek continuances in January 2009.²

b. The Government does not seek to preclude the parties from submitting any filings during the requested continuance, should they desire to do so, or to prevent any judge from scheduling and hearing a matter deemed to be something other than a proceeding, and thus not precluded by E.O. 13492. The twofold purpose of this motion is (1) to preserve the *status quo* as it existed on 22 January 2009 and as it exists today, and (2) to preclude any judicial decisions or rulings on dispositive issues until the Attorney General, in consultation with the Secretary of Defense, decides as to which accused the military commissions will resume, and until the legislation now pending in Congress to reform military commissions becomes law. For those reasons, the Government requests this military commission to refrain from taking any actions in the case -- whether or not any "sessions" of a commission may occur -- with the exception of any rulings that must be made (including a ruling on the instant motion itself) to preserve the *status quo* of the

² The Government's original motion in January did not attempt to define the scope of the requested continuances. In some cases, however, the military judges defined the scope of a continuance at the time it was ordered. In the case of *United States v. Ghailani*, for instance, the continuance issued by the military judge expressly contemplated that discovery by the parties would continue and that the judge would continue to take certain actions not requiring a "session." See Ruling on Government Motion for Continuance, *United States v. Ghailani* (Feb. 13, 2009). Similarly, in the case against the September 11th co-conspirators, *United States v. Mohammed*, the military judge issued a ruling (in response to a defense motion for relief regarding the submission by the accused to the commission of a document) in which he assumed the prosecutors had not sought (and he, in an earlier ruling on the continuance, had not ordered) "a 'halt' to any and all actions related to this case, but merely on-the-record hearings with counsel, the accused, and the military judge." The judge concluded that his ruling was consistent with the prosecution's request and his earlier grant of a continuance, because "[s]ince recessing on 21 January 2009, the military judge has not called the Military Commission *into session*." Order on Defense Motion for Special Relief, *United States v. Mohammed* (Mar. 18, 2009)(emphasis added). See R.M.C. 905(h) (providing that the military judge may dispose of written motions without a session of the commission). In *United States v. Khadr*, the military judge has conducted two hearings of record, both during the pendency of E.O. 13492, to resolve issues of counsel conflict. And finally, in *United States v. Kamin* and *United States v. Noor*, the judge in each case has allowed discovery to proceed during the continuances.

case to the greatest extent practicable. More specifically, the Government requests that the military commission refrain at this point from conducting any hearing to assess the competency of Ramzi bin al Shibh and Mustafa Ahmed al Hawsawi to elect to proceed *pro se* in this case, which is currently scheduled for 21 September 2009. Any ruling on the competency of these accused could have a dispositive effect, at a time when a prosecution-forum decision is still under review. Even if no ruling is made on the competency issue at this time, taking evidence in such a hearing could prejudice the outcome of litigation on this and related issues in the event of a prosecution in federal court.

7. Conclusion: For the foregoing reasons, the military commission should extend the previously granted continuance of further proceedings in the above-captioned case until 16 November 2009 and should adopt the attached Findings of Fact, Conclusions of Law, and Order. (Attachment B). Additionally, this delay should be excluded when determining whether any period under R.M.C. 707(a) has run.

8. Oral Argument: The Government does not request oral argument but is prepared to argue this motion should the commission find it helpful.

9. Witnesses and Evidence: No witnesses. The Government respectfully requests the commission to consider the attachments to this motion as evidence of the asserted facts.

10. Certificate of Conference: The Government notified the Defense of the requested relief and Defense Counsel for Mr bin al Shibh did not object. Defense counsel for Mr. Hawsawi could not be reached but indicated during a phone call on 14 September that they would not object should a request for continuance have to be filed.

11. Attachments:

- A. Declaration of the Honorable Jeh C. Johnson
- B. Government Proposed Findings of Fact, Conclusions of Law, and Order

Respectfully Submitted,

//S//

Clayton Trivett, Jr.
Prosecutor

DECLARATION OF JEH C. JOHNSON

Pursuant to 28 U.S.C. § 1746, I, Jeh C. Johnson, hereby declare:

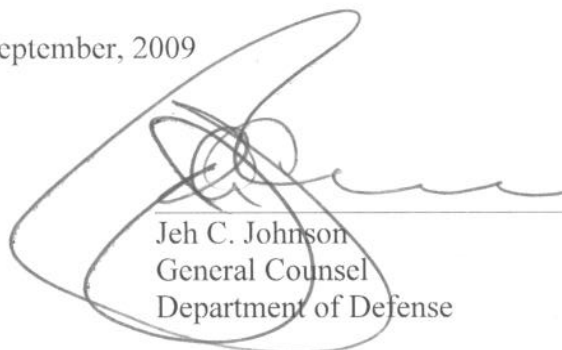
1. I am the General Counsel for the Department of Defense. As such, I serve as the chief legal officer for the Department of Defense and the legal advisor to the Secretary of Defense. I was appointed to this position on February 10, 2009, following nomination by the President and confirmation by the Senate. The statements made herein are based on my personal knowledge and information made available to me in my official capacity.

2. President Barack Obama signed Executive Orders 13492 and 13493 on January 22, 2009. These Executive Orders require a comprehensive review of each individual detained at Guantanamo Bay, Cuba and of our nation's detention policy in general. An inter-agency task force and several inter-agency review teams were created as a result of Executive Order 13492. The task force and review teams are now diligently reviewing the Guantanamo detainees' files and recommending the transfer, release or prosecution or other disposition for each detainee. Cases referred for possible prosecution then require a team of prosecutors from the Department of Justice and the Office of Military Commissions to further investigate and recommend whether to prosecute the detainee in a federal civilian court or before a military commission. At present, more than half of the over 200 Guantanamo detainees have been reviewed in this process, and the process is on-going.

3. The Attorney General, after consulting with the Secretary of Defense, will decide, and this commission will be informed, within 60 days from 17 September 2009 whether the accused in this case will be prosecuted in federal court or by military commission, or referred back to the Executive Order 13492 Review for other appropriate disposition. Once a prosecution forum decision, if any, is made, the review process ordered by Executive Order 13492 will be complete and the halt in proceedings required by Section 7 of the Executive Order will be lifted with respect to that detainee.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 15th of September, 2009



Jeh C. Johnson
General Counsel
Department of Defense